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No. 91-133

Supreme Court, U.S.
FILED
SEP 17 1991
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In the Supreme Court of the United States

OCTOBER TERM, 1991

BROOKHURST, INC., AS SUCCESSOR BY MERGER WITH COMMERCIAL UNIFORM COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Internal Revenue Service may issue a corrected tax assessment pursuant to Section 6204(a) of the Internal Revenue Code in order to collect an erroneously refunded employment tax.

2. Whether, pursuant to Section 6601(a) of the Internal Revenue Code, interest accumulates on the unpaid taxes from the date petitioner received the erroneous refund.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 931 F.2d 554. The opinion of the district court (Pet. App. B3-B17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1991. The petition for a writ of certiorari was filed on July 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Section 6204(a) of the Internal Revenue Code, 26 U.S.C. 6204(a), provides:

> The Secretary may, at any time within the period prescribed for assessment, make a supplemental assessment whenever it is ascertained that any assessment is imperfect or incomplete in any material respect.

2. Section 6501(a) of the Internal Revenue Code, 26 U.S.C. 6501(a), provides in relevant part:

> Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed * * *.

3. Section 6502(a) of the Internal Revenue Code, 26 U.S.C. 6502(a), provides in relevant part:

> Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—
>
> (1) within 6 years after the assessment of the tax * * *.

4. Section 6601(a) of the Internal Revenue Code, 26 U.S.C. 6601(a), provides in relevant part:

> If any amount of tax imposed by this title * * * is not paid on or before the last date prescribed for payment, interest on such amount * * * shall be paid for the period from such last date to the date paid.

STATEMENT

1. On January 21, 1984, petitioner filed its Employer's Quarterly Federal Tax Return for the fourth quarter of 1983. That return reported an employment tax liability of $194,874.76, which was paid.

Thereafter, an Internal Revenue Service (IRS) agent mistakenly assessed petitioner's liability for that quarter as $971.82. Because of this erroneous assessment, the IRS informed petitioner on May 7, 1984, that it would receive a refund. The IRS mailed the refund check in the amount of $195,810.51 to petitioner on May 8, 1984. The amount of the refund included interest. Pet. App. A2-A4.

On May 10, 1984, petitioner cashed the check and deposited the proceeds into its corporate bank account. Petitioner also returned a copy of the refund notice to the IRS with the notation "our records indicate our return was correctly filed. Please review your records and advise. Thank you." Pet. App. A4. Petitioner, however, never returned or attempted to return the erroneous refund to the IRS. *Ibid.*

Approximately two years later, the IRS discovered its mistake. On May 19, 1986, the IRS therefore made a supplemental assessment of $193,902.91 against petitioner for employment taxes due for the fourth quarter of 1983 and also assessed $57,234.34 in interest. After notice and demand for payment, petitioner refused to pay. The IRS then levied against petitioner's bank accounts and collected the assessed tax, interest and collection costs.[1] Pet. App. A4-A5.

2. Petitioner commenced an action to recover the amounts collected by the IRS. Petitioner contended that the government's exclusive remedy was a suit to recover the "erroneous refund" under Section 7405 of the Internal Revenue Code and that the two-year

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[1] The IRS also assessed and collected a penalty under Section 6651(a) of the Code, 26 U.S.C. 6651(a), for failure to pay the tax in a timely manner. The district court held that, in these circumstances, a late-payment penalty was not proper (Pet. App. B15-B16). The government did not challenge that determination on appeal.

limitations period for bringing such a suit had expired. Pet. App. A8-A9. Petitioner also contended that, because the underpayment in tax was due to the government's error, petitioner should not be liable for the interest imposed under Section 6601 of the Code. *Id.* at A18-A19.

The district court held (Pet. App. B10-B13) that, while an "erroneous refund" suit under Section 7405 was time-barred, the United States had validly issued a corrected assessment under Section 6204(a) within the three-year period allowed under Section 6501(a) and had thereafter validly collected the newly assessed employment tax within the six-year period allowed by Section 6502(a). The court agreed with petitioner, however, that the United States was not entitled to assess interest on the unpaid tax under Section 6601(a). See Pet. App. B13-B14.

3. Both parties appealed. The court of appeals affirmed the district court's ruling that the United States properly corrected its assessment and collected the erroneously refunded employment taxes. Pet. App. A7-A17. The court reversed, however, the district court's ruling that the United States was not entitled to assess interest on the tax, concluding that Section 6601(a) authorized the government to assess and collect interest from the date the IRS made the erroneous refund. Pet. App. A17-A23.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Pursuant to Section 6201(a) of the Internal Revenue Code, the IRS is "authorized and required" to make assessments of taxes imposed by the Code. Section 6204(a) of the Code further provides that the IRS "may, at any time within the period for assessment, make a supplemental assessment whenever it is ascertained that any assessment is imperfect or incomplete in any material respect." 26 U.S.C. 6204(a). Section 6501(a) allows such assessments to be made at any time "within 3 years after the return was filed * * *." 26 U.S.C. 6501(a). The court of appeals thus correctly held (Pet. App. A14-A15) that, because the original assessment was incorrect, the government was authorized by Section 6204(a) to issue a corrected assessment of petitioner's tax liability within the three-year period allowed by Section 6501(a).

Notwithstanding the clear language of these provisions, petitioner contends (Pet. 26-37) that the government's *exclusive* means for recovery was not by issuance of a corrected assessment under Section 6204(a) but was instead by commencing an action for recovery of an "erroneous refund" under Section 7405 of the Code. Petitioner claims that, since the two-year statute of limitations for bringing suit under Section 7405 had expired (see 26 U.S.C. 6532), the government was barred from collecting the tax.[2]

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[2] Section 7405(b) provides (26 U.S.C. 7405(b):

> Any portion of a tax imposed by this title which has been erroneously refunded (if such refund would not be

Petitioner's argument is incorrect. When Congress has created two different methods for recovery of a tax, the fact that one method may be barred by a statute of limitations does not prohibit recovery under the other. See *United States* v. *Whited & Wheless, Ltd.*, 246 U.S. 552, 554 (1918); *Beer* v. *Commissioner*, 733 F.2d 435, 436 (6th Cir.), cert. denied, 469 U.S. 857 (1984). Indeed, the legislative history of Section 7405 expressly reflects that Congress specifically understood and intended that these two alternatives for recovery of a tax following an erroneous refund were *not* mutually exclusive. The Senate report accompanying the original enactment of Section 7405 (then Section 610 of the Revenue Act of 1928, ch. 852, 45 Stat. 875) stressed that, while an "erroneous refund" suit was authorized by that statute "within two years after the making of the refund,"

> [o]bviously, *if the limitation period on the making of assessment has not expired, the erroneous refund may be recovered by assessment in the ordinary manner.*

S. Rep. No. 960, 70th Cong., 1st Sess. 42 (1928) (emphasis added). Several courts have held that this legislative history squarely refutes petitioner's claim that an "erroneous refund" action under Section 7405 is the exclusive remedy available to the United States in these circumstances. See Pet. App. A16; *Beer* v. *Commissioner*, 733 F.2d at 436-437; *Ideal Realty Co.*

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considered as erroneous under section 6514) may be recovered by civil action brought in the name of the United States.

Section 6532(b) provides (26 U.S.C. 6532(b)):

Recovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund * * *.

v. *United States*, 561 F.2d 1123, 1125 (4th Cir. 1977); *Warner* v. *Commissioner*, 526 F.2d 1 (9th Cir. 1975).[3]

As the court of appeals concluded in this case (Pet. App. A15), because the original tax assessment was in error, Section 6204(a) authorizes a supplemental assessment to correct that error. The supplemental assessment was timely made under Section 6501(a) and was timely collected under Section 6502(a). There is no conflict among the courts of appeals on the issue presented and addressed in this case.[4]

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[3] Petitioner errs in relying (Pet. 11-17) on cases that involve the different question of when taxes are deemed "paid" for purposes of determining the statute of limitations for a refund claim. See, *e.g.*, *Rosenman* v. *United States*, 323 U.S. 658 (1945); *Ehle* v. *United States*, 720 F.2d 1096 (9th Cir. 1983); *Ford* v. *United States*, 618 F.2d 357 (5th Cir. 1980); *Ameel* v. *United States*, 426 F.2d 1270 (6th Cir. 1970); *Fortugno* v. *Commissioner*, 353 F.2d 429 (3d Cir. 1965); *Plankinton* v. *United States*, 267 F.2d 278 (7th Cir. 1959); *Thomas* v. *Mercantile Nat'l Bank*, 204 F.2d 943 (5th Cir. 1953); *United States* v. *Dubuque Packing Co.*, 233 F.2d 453 (8th Cir. 1956). See generally 15 J. Mertens, *Law of Federal Income Taxation*, §§ 58.55-58.57 (1989). That issue is not presented in this case.

[4] Petitioner cites several cases (Pet. 18-26) that involve the factually and legally different situation that arises when the IRS issues an erroneous refund after it makes an *accurate* assessment of taxes and thereafter issues no supplemental or corrected assessment. In that circumstance, some courts have held that the IRS must pursue an "erroneous refund" suit under Section 7405 because there is no outstanding assessed tax liability to collect administratively. See, *e.g.*, *Kelley* v. *United States*, 30 F.2d 193 (9th Cir. 1929); *Rodriguez* v. *United States*, 629 F. Supp. 333 (N.D. Ill. 1986); *United States* v. *Young*, 79-2 U.S.T.C. ¶ 9609 (D. Del. 1979). But see *Burns* v. *United States*, 90-2 U.S.T.C. ¶ 50,479 (S.D. Fla. 1990) (IRS was not prohibited from collecting by levy tax

2. Section 6601 of the Code requires that interest be imposed on taxes that are not paid on the date that they are due. See *Bowman* v. *United States*, 824 F.2d 528, 531 (6th Cir. 1987); *United States* v. *Means*, 621 F.2d 236, 238 (6th Cir. 1980); *Williams* v. *United States*, 667 F.2d 1108, 1111 (4th Cir. 1981). The interest provided by Section 6601 is not a penalty for late payment; instead, it represents compensation to the government for the delayed payment of taxes. *United States* v. *Childs*, 266 U.S. 304, 309-310 (1924); *Grauvogel* v. *Commissioner*, 768 F.2d 1087, 1090 (9th Cir. 1985); *Johnson* v. *United States*, 602 F.2d 734, 737 (6th Cir. 1979); *Vick* v. *Phinney*, 414 F.2d 444, 448 (5th Cir. 1969). The court of appeals correctly held that interest was due on the erroneously refunded monies from the date petitioner received such funds because that was the date from which petitioner "had the use of funds which rightfully belonged to the United States" (Pet. App. A23).[5] See *Bowman*

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assessments, which had once been paid, when taxpayer revived underlying assessment by obtaining and depositing an IRS refund check). Cf. *Tucker* v. *United States*, 89-1 U.S.T.C. ¶ 9336 (S.D.N.Y. 1989) (IRS issued refund before it timely assessed taxes; therefore its levy to collect taxes was proper); *Pesch* v. *Commissioner*, 78 T.C. 100, 120 (1982) (same). That, of course, is not the situation presented by this case. Instead, this case involves the different situation precisely addressed in the legislative history where the agency issued an *incorrect* original assessment and "[o]bviously" would be permitted to issue a timely, corrected assessment in order to collect the taxes due. See Pet. App. 16A; S. Rep. No. 960, *supra*, at 42.

[5] Petitioner's contention (Pet. 40-41) that Section 6602 of the Code limits the government's recovery of interest is in error. That Section applies only to Section 7405 of the Code. The government was not limited to, and did not pursue, an erroneous refund suit in this case.

v. *United States*, 824 F.2d at 531; *Cibelli* v. *United States*, 585 F. Supp. 799, 800-801 (D. Conn. 1984). There is no conflict among the courts of appeals nor other reason to justify further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1991

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